Supreme Court, U.S.
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No. 94-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOYCE WOODALL and
CONCERNED WOMEN FOR AMERICA,

Plaintiffs/Petitioners

v.

JANET RENO, Attorney General
of the United States, and
UNITED STATES OF AMERICA,

Defendants/Respondents

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Freedom of Access to Clinic Entrances Act of 1994 ("FACE Act") discriminates on the basis of the content of speech, in violation of the First Amendment, by placing special criminal penalties on peaceful sit-ins and picketing only on the subject of abortion, and whether the *O'Brien* standard applies to such expression or should be overturned.

2. Whether the FACE Act discriminates on the basis of the viewpoint of pro-life protesters' speech, in violation of the First Amendment, by placing special criminal penalties on peaceful sit-ins and picketing only by pro-life protesters at abortion clinics.

3. Whether the FACE Act is a prior restraint that violates the First Amendment.

4. Whether the FACE Act is unconstitutionally vague and overbroad.

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INTRODUCTION

This case involves clever content discrimination and viewpoint discrimination. The cleverness erodes and the discrimination becomes apparent, however, when one considers the constitutionality of a statute on the opposite side of the abortion issue. Suppose the legal climate were reversed from that of the present, such that no constitutional right to abortion still existed and abortion was in fact illegal in many if not all states. Suppose a vocal group of abortion supporters continued to press for a change in the law and in individuals' behavior, the overwhelming majority by nonviolent sit-ins and obstructive picketing at adoption offices, but some unfortunately by violence, at a time when there were never protests at pro-choice offices because the pro-life advocates had already won the legislative debate. Suppose Congress reacted to the abortion supporters' protests, nonviolent and violent, by adopting a pro-life version of FACE, imposing severe criminal penalties on persons who by "physical obstruction . . . interfere[d] with any person because that person is . . . , or in order to intimidate such person . . . from, obtaining or providing alternative reproductive health services."

Is there any doubt that existing First Amendment and Fifth Amendment jurisprudence would require the invalidation of the mirror-image statute? It follows that if the pro-life version of FACE would be unconstitutional, the pro-choice version of FACE now before this Court is unconstitutional.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit is the first Court of Appeals decision on FACE, and is reported at 1995 U.S. App. LEXIS 2594 (4th Cir. Feb. 13, 1995). The decision of the istrict court is not reported.[1]

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[1]The other reported district court decisions construing FACE (and erroneously upholding it) are:

JURISDICTION

Federal jurisdiction exists under 28 U.S.C. § 1331. A dismissal was entered by the district court on July 15, 1994. The Fourth Circuit affirmed on February 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition involves the Freedom of Access to Clinic Entrances Act ("FACE"), codified at 18 U.S.C. § 248. FACE is quoted in full in the Appendix.

STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS

This lawsuit was filed by an individual pro-life protester -- a 66-year old grandmother who was arrested and threatened with prosecution under FACE for peacefully praying on an abortion clinic's steps -- and the nation's largest pro-life women's organization, Concerned Women for America. The suit challenges the constitutionality of FACE under the First and Fifth Amendments.

In the district court, plaintiffs moved for a preliminary injunction and the government cross-moved to dismiss the complaint. The district court granted the motion to dismiss and denied the preliminary injunction, upholding the constitutionality of the Act

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United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994), *mandamus denied sub nom.* Hatch v. Stadtmueller, 1994 U.S. App. LEXIS 32656 (7th Cir. Nov. 10, 1994) (criminal); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994) (civil); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994) (civil); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) (civil). Other pending FACE cases are: Cheffer v. Reno, No. 94-611-CIV-ORL-18 (M.D. Fla.); and Hoffman v. Hunt, No. 3:93-CV-393-P (W.D.N.C.).

for the same reasons that the court had dismissed another challenge to the Act a few weeks earlier in *American Life League v. Reno*, 855 F. Supp. 137 (E.D. Va. 1994). App. II at A-31 (*Woodall* Order); App. II at A-32 (*American Life League* Order).

The Fourth Circuit affirmed the dismissal, also upholding the Act. *Woodall v. Reno*, 1995 U.S. App. LEXIS 2594, App. I at A-1. *See also American Life League v. Reno*, 1995 U.S. App. LEXIS 2596 (Feb. 13, 1995), App. I at A-5.

B. STATEMENT OF THE FACTS

The Freedom of Access to Clinic Entrances Act of 1994 became law on May 26, 1994. The Act makes it a federal crime if a person:

> by force or threat of force or *by physical obstruction,* intentionally injures, intimidates or *interferes with or attempts to* injure, intimidate or *interfere with any person* because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, *obtaining or providing reproductive health services.*

18 U.S.C. § 248(a)(1).[2] The Act also makes it a federal crime to damage or destroy the property of a facility "because such facility provides reproductive health services." § 248(a)(3). The Act excepts actions by a parent or legal guardian "insofar as they are directed exclusively at the minor." § 248(a).

The Act imposes criminal penalties of imprisonment and fines. § 248(b). The Act also includes civil remedies, creating a right of action on behalf of "[a]ny person aggrieved by" a violation of the Act, *if* the aggrieved person was "involved in providing or seeking to provide, or obtaining or seeking to obtain, services

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[2]Throughout this Petition, all emphasis is added unless otherwise noted.

in a facility that provides reproductive health services." § 248(c)(1)(A).

The Act also authorizes the United States Attorney General and the state attorneys general to institute their own civil actions if there is "reasonable cause to believe that any person or group of persons is being, has been, or *may be* injured by conduct constituting a violation" of FACE. § 248(c)(2)(A), (c)(3)(A).[3]

REASONS FOR GRANTING THE WRIT

Review on writ of certiorari is appropriate in this case because the Fourth Circuit Court of Appeals has decided an important question of federal law -- the constitutionality of the FACE Act -- that has not been, but should be, settled by this Court, and because the Fourth Circuit decided this important federal question in a way that conflicts with applicable decisions of this Court. FACE is being challenged in a number of jurisdictions, and direction from this Court is required.

The FACE Act was not intended to and does not evenhandedly punish unlawful protest activity regardless of the subject matter of the protest or the viewpoint of the protester. Instead, FACE was intended to and actually does punish protest activity only by pro-life protesters. It is the only federal statute designed to regulate political protests of only one selected movement (the pro-life movement) at one selected site (abortion clinics). It is therefore unconstitutional content- and viewpoint-based discrimination. In addition, FACE seeks to punish even

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[3]Finally, the Act includes a "Rules of Construction" section, § 248(d), and a "Definitions" section, § 248(e). The defined terms are "facility," "interfere with," "intimidate," "physical obstruction," "reproductive health services," and "state." The definitions themselves are recited in the Argument sections of this Petition.

nonviolent expressive activity by vague and overbroad terms, with the necessary result that free speech of pro-life protesters will be unconstitutionally chilled.

I. THE FACE ACT DISCRIMINATES ON THE BASIS OF THE CONTENT OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT. THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW, AND THE FOURTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS.

A. Peaceful Sit-Ins and Picketing at Abortion Clinics Are Speech that Is as Protected by the First Amendment as Are Other Sit-Ins and Picketing.

Sit-ins and picketing on First Amendment issues have long been recognized as forms of speech protected by the First Amendment.[4] They do not lose their character as speech, or their protection, because they are on a particular topic, such as "reproductive health" (the original FACE Act said "abortion").[5]

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[4]The expressive elements of expressive conduct are just as protected by the First Amendment as "pure speech." Texas v. Johnson, 491 U.S. 397, 406 (1989). The Court has held that protest sit-ins and picketing on a variety of issues are all expressive conduct. *E.g.*, Brown v. Louisiana, 383 U.S. 131, 141-142 (1966); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968). *See also* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969) (students' wearing of black armbands to protest the Vietnam War is expressive conduct).

[5]Certainly, the non-violent activities engaged in by pro-life protesters generally are protected First Amendment activities, and the same is true of the activities of petitioners in this case. *E.g.*, Cheffer v. McGregor, 6 F.3d 705, 712 (11th Cir. 1993); New York State NOW v. Terry, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Mississippi Women's Medical Clinic v. McMillan,

Nor do peaceful sit-ins and picketing lose their First Amendment protection because some nonpeaceful acts have occurred by others, purportedly in support of the same cause. The same argument was made for special regulation of nonlabor picketing, and this Court rejected it in *Police Dept. v. Mosley*, in words that apply remarkably to pro-life picketing:

> If peaceful *labor* picketing is permitted, there is no justification for prohibiting all *nonlabor* picketing, both peaceful and nonpeaceful. . . .
>
> Similarly, we *reject* the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, *as a class*, nonlabor picketing is *more prone to produce violence* than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. . . . Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. . . .
>
> . . . *[T]he excesses of some nonlabor picketing may not be controlled* by a broad ordinance prohibiting both peaceful and violent picketing. Such *excesses "can be controlled by narrowly drawn statutes"* focusing on the abuses and *dealing evenhandedly* with picketing *regardless of subject matter*.

408 U.S. 92, 100-102 (1972). A strong but irrelevant argument against the civil rights movement was that it was in some instances accompanied by violence and engendered violence.[6] The same argument was made

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866 F.2d 788 (5th Cir. 1989); Cannon v. City of Denver, 998 F.2d 867 (10th Cir. 1993).

[6]Even where the expressive activity includes violence and threats of violence, which are not protected by the First Amendment, "'precision of

against the environmental movement, because extremists spiked trees and risked nuclear power plant meltdowns. The same argument can be made about nearly every demonstration, whether against the Vietnam War, the South African embassy, employers, animal research laboratories, fur stores, or other subjects and ideologically objectionable places.

One unique question in this case is whether government may discriminate between various speech issues by imposing special penalties, prohibitions, and protections on one speech issue: abortion or reproductive health. It is always easy for government to argue special effects arise from a form of protest, but the argument that sit-ins and picketing are accompanied by violence has been made by the subjects of every sit-in and picket in this century. This Court's prior rulings on content discrimination do not permit discriminatory regulation without satisfaction of a strict scrutiny test.

B. The FACE Act Amounts to Content Discrimination against Protected Speech on the Subject of Abortion, Even if It Is Neutral between Pro-Life and Pro-Choice Viewpoints (and It Is Not). The Fourth Circuit's Decision Conflicts with This Court's Content Discrimination Test Under *R.A.V.* and Other Cases.

The "bedrock principle" of the First Amendment is that content-based restrictions on expression -- verbal or nonverbal or both -- are presumptively invalid and almost never justified.[7] As this Court held in

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regulation' is demanded" "[w]hen such conduct occurs in the context of constitutionally protected activity." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

[7] *See* R.A.V. v. City of St. Paul, --- U.S. ---, ---, 112 S. Ct. 2538, 2542, 120 L.Ed.2d 305 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. ---, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991); Texas v. Johnson, 491 U.S. 397, 406

Police Dept. v. Mosley:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign. *But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.* . . .

408 U.S. at 95.[8]

1. The FACE Act's Prohibitions

The FACE Act makes a crime out of a wide range of peaceful activity, and is violated by whoever "by physical obstruction . . . interferes with or attempts to . . . interfere with any person because that person is . . . obtaining or providing reproductive health services." As the Fourth Circuit acknowledged in the companion case, "[o]f course, peaceful but obstructive protesting, which plaintiffs argue has expressive elements, could run afoul of the Act. For example, protesters blocking a clinic door as they pray might violate the Act's prohibitions on physical obstruction." *American Life League*, slip op. at 16, App. I at A-21. The legislative history makes clear that the Act was directed at both peaceful and violent activities: "A nationwide campaign of anti-abortion *blockades*, invasions, vandalism *and* outright *violence*."

(1989); Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980); Police Dept. v. Mosley, 408 U.S. at 95; Cantwell v. Connecticut, 310 U.S. 296, 309-311 (1940).

[8]*See also* Texas v. Johnson, 491 U.S. 397, 414 (1989); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978); City of Madison, Joint School Dist. No. 8 v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175-76 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 215 (1975).

S. Rep. No. 117, 103rd Cong., 1st Sess. 3 (1993).

The Fourth Circuit entirely ignored the following content discrimination argument, and discussed content discrimination only as synonymous with viewpoint discrimination.

2. The FACE Act's Prohibitions Discriminate on the Basis of Content.

The FACE Act prohibits those forms of peaceful demonstrations *only* when they are tied to a particular subject matter: "reproductive health." Thus,

> if a labor picketer and a pro-life picketer peacefully sit-in beside each other to block the door of the same abortion clinic, the labor picketer does not commit a crime while the pro-life picketer violates the FACE Act;

> if the same person peacefully demonstrates to obstruct the abortion clinic entrance on Monday, and identically demonstrates to obstruct a segregated lunch counter on Tuesday, and identically demonstrates to obstruct a university animal research laboratory on Wednesday, only the pro-life demonstration is a federal crime under the FACE Act.

Thus, the FACE Act has selected *by content* one subject of peaceful sit-in and picketing (reproductive health), out of the wide range of identical demonstrations such as nuclear protests, animal research protests, fur protests, logging protests, gay rights protests, embassy protests, etc. Moreover, the FACE Act has discriminatorily applied draconian criminal sanctions to that one subject, which do not apply to otherwise identical demonstrations on other subjects. This content discrimination violates the First Amendment even if the FACE Act is viewpoint neutral between pro-life and pro-choice positions (which it is not; *see infra* Part II).

> The rationale of the general prohibition [on content discrimination], after all, is that content discrimination "rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."

R.A.V., 112 S. Ct. at 2545 (*quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501, 508, 116 L. Ed. 2d 476 (1991)).

3. The Fourth Circuit's Approach Eviscerates This Court's Holdings in *R.A.V., Texas, Boos, Mosley, Schacht, Carey,* and Other Cases

The Fourth Circuit proposes the readily manipulable test that there is no content discrimination if all *viewpoints* are equally treated and "special needs" require regulation. Equal treatment of all viewpoints on a subject is irrelevant to whether content discrimination occurs, although in fact viewpoint discrimination also occurs under the FACE Act (Part II). Special needs can always be found to justify anything, and every form of sit-in and picketing in this century has been attacked as being accompanied by a violent fringe.

This Court has not had difficulty finding content discrimination in laws made "with[] reference to the content of the regulated speech":

> Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech."

Madsen v. Women's Health Center, --- U.S. ---, ---, 114 S. Ct. 2516, 2523, 129 L. Ed. 2d 593 (1994). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry*, 485 U.S. 312, 320 (1988); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

Thus, there was content discrimination when government discriminatorily regulated:

> Placing a symbol knowing it arouses alarm on the basis of race, *R.A.V.*, 112 S. Ct. 2538;
> Desecrating a flag (or venerated object) intentionally, *Texas v. Johnson,* 491 U.S. 397;
> Displaying a sign within 500 feet of an embassy tending to bring it into public disrepute, *Boos*, 485 U.S. 312;
> Picketing other than peaceful labor picketing within 150 feet of a school, *Police Department v. Mosley*, 408 U.S. 92;
> Picketing other than labor picketing in a residential area, *Carey v. Brown,* 447 U.S. 455 (1980);
> Wearing a military uniform in a play only if the portrayal does not tend to discredit the military, *Schacht v. United States,* 398 U.S. 58 (1970);
> Locating commercial paper boxes where newspaper boxes are allowed, *City of Cincinnati v. Discovery Network, Inc.*, --- U.S. ---, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

C. The FACE Act Does Not Meet the *Boos* and *R.A.V.* Test of Strict Scrutiny, and the Fourth Circuit Erred in Applying Intermediate Scrutiny.

1. The Strict Scrutiny Test Is Not Met.

This Court reiterated the strict scrutiny test applicable to content discrimination in *Boos,* 485 U.S. at 344-45, and *R.A.V.*, 112 S. Ct. at 2549-50. That test finds a law to be content-based when it is justified by reference to the content of the regulated speech, and requires that the content distinction be "necessary to serve a compelling state interest and . . . narrowly drawn." *Id.*

a. Clear Reference to the Content of the Regulated Speech

There are three ways to show that the FACE Act is written "with[] reference to the content of the regulated speech."

First, the FACE Act is facially based on the content of the regulated speech, prohibiting peaceful physical obstruction that interferes with someone "because that person is . . . obtaining or providing reproductive health services" (the prior version said simply "abortion"). The Act is clever in not discriminating against "speech about reproductive health services" (or "abortion"), but only against speech "because that person is . . . obtaining or providing reproductive health services" (or "abortion"). However, the substance is the same, because demonstrating against abortion is nearly synonymous with demonstrating against abortion clinic customers and abortionists. Similarly, it is the same to criminalize "sit-ins at segregated lunch counters," or "sit-ins because that person is providing segregated seating." It is the same to criminalize "sit-ins at university ROTC buildings," or "sit-ins because a person is providing military training." All such requirements are justified by reference to the content of the regulated speech.

Second, the FACE Act's reference to content is clear in its explicit application to peaceful "physical obstruction" and "interfere[nce]" with "reproductive health services," rather than excluding peaceful sit-ins and picketing.

> The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute, casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law.

R.A.V., 112 S. Ct. at 2550. The FACE Act's singling out of abortion clinic sit-ins and picketing, rather than all sit-ins and picketing that "physically obstruct" doors or walkways or "interfere" with consti-

tutional rights, similarly shows that the Act is written "with reference to the content of the regulated speech." Like the statute struck down in *R.A.V.*, the FACE Act is therefore overnarrow; a statute "not limited to the favored [or disfavored] topics . . . would have precisely the same beneficial effect." 112 S. Ct. at 2550. An *overnarrow statute*:

> create[s] a *conclusive presumption* that in fact the state interest which the statute serves is an anti-[speech] rather than a non-speech interest.

M. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment*, § 2.06[B] at 2-94 (1984).

Third, the FACE Act's proponents were quite overt in admitting that they sought to regulate "anti-abortion" protests at "abortion clinics." (This is further discussed in Part II on viewpoint discrimination.)

For these reasons, *Wisconsin v. Mitchell*, --- U.S. ---, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), has no application to this case. In *Mitchell*, the only activity at issue was a physical assault, which the Supreme Court has repeatedly held is not expressive conduct. *Id.* at 2199. By contrast, and as the Fourth Circuit acknowledged, the activities proscribed by the FACE Act include peaceful speech. *American Life League v. Reno*, slip op. at 16, App. I at A-21 ("protesters blocking a clinic door as they pray might violate the Act's prohibition on physical obstruction"). The *only* activities in the facts of this and the companion case are peaceful speech.

In addition, there is a significant difference between the motive that was proscribed by the statute at issue in *Mitchell* (intentionally selecting the assault victim because of his race) and the motive proscribed by the FACE Act (directing *speech* at a person obtaining or providing an abortion). *Mitchell*

approved the Wisconsin statute because it was aimed at "*bias*-inspired conduct" that "is thought to inflict greater individual and social harm." 113 S. Ct. at 2201. The expressive conduct proscribed by the FACE Act is *not* bias-inspired, *see Bray*, 113 S. Ct. at 759, but is motivated by a concern for the rights and the life of the unborn child. Acting on racist beliefs is illegal in this country, so that a penalty-enhancement for committing a racism-inspired crime is constitutional. Acting on pro-life beliefs is *not* a crime in this country, and constitutionally could not be, so that it is unconstitutional to impose penalties on pro-life protests that are not imposed on political protests generally.

b. No Compelling State Interest in Including Peaceful Sit-Ins and Picketing, and No Narrow Drawing To Include Only Violence

The FACE Act's discrimination is not "necessary to serve a compelling state interest" and is not "narrowly drawn." *Boos*, 485 U.S. at 321; *R.A.V.*, 112 S. Ct. at 2549-50.[9] The issue is not whether a law against violence is necessary to serve a compelling state interest, because any law against actual violence is. The issue is whether the FACE Act needs to sweep into its path nonviolent sit-ins and picketing, and to discriminate within the world of peaceful sit-ins and picketing. No compelling interest requires that, and such a sweep is far from narrowly drawn.

First, there is no compelling interest in criminalizing peaceful sit-ins and picketing at abortion clinics. The compelling interest test is easily manipulated by focusing on the broader interest *not* at stake (prohibiting violence), rather than the narrower interest *actually* at stake (prohibiting peaceful sit-ins and picketing). Government can perfectly well prohibit violence anywhere, while not crushing nonviolent speech.

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[9]*See also* Simon & Schuster, 112 S. Ct. at 509; Mosley, 408 U.S. at 101.

Second, the FACE Act is not "narrowly drawn," when it goes beyond criminalizing violence to criminalize peaceful sit-ins and picketing at the abortion clinics that it preferentially protects.

> But the danger of censorship presented by a facially content-based statute requires that the weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest."
>
> . . .
>
> . . . The dispositive question . . . is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.

R.A.V., 112 S. Ct. at 2549, 2550. Barring peaceful sit-ins and picketing is not "necessary." An ordinance not barring them "would have precisely the same beneficial effect."

As in *R.A.V.*, despite the government's protestations that it regulated a serious problem, this Court "nonetheless conclude[d] that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses." 112 S. Ct. at 2542.

2. The *O'Brien* Test Does Not Apply

The Fourth Circuit erroneously relied on the *O'Brien* test. As this Court said in *Texas v. Johnson*, "we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the government interest is *unrelated* to the suppression of free expression.'" The FACE Act is not "unrelated," whether or not it is indirectly or directly pointed at suppression of free expression, because it concededly bars sit-ins and picketing that peacefully obstruct clinic entrances.

However, if the *O'Brien* test does apply to deny strict scrutiny to content- and viewpoint-based discrimination, it should be overturned.

3. The Time, Place, and Manner Test Does Not Apply

FACE fails even this less rigorous level of scrutiny.

The Fourth Circuit did not treat the FACE Act as a time, place, or manner restriction, and indeed it is not.

First, the Act not being a time, place, or manner restriction is evident in its criminal penalties and in its speaking in terms of content. As in *Mosley,* a law that speaks in terms of subject matter cannot be a time, place, or manner restriction:

> In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content." This is never permitted.

408 U.S. at 99 (quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 29). Similarly, *Boos* did not find the prohibition on sign displays within 500 feet of embassies to be a time, place, or manner restriction because not all signs were barred, and *Madsen* did not treat an injunction against certain protest activities within 300 feet of abortion clinics as time, place, or manner restrictions because not all protests were barred within 300 feet of all places.

Second, the FACE Act would not survive the test for time, place, and manner restrictions even if it were content neutral. It is not narrowly tailored,

Ward, 491 U.S. at 791, to "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz,* 487 U.S. 474, 485 (1988), because it hits peaceful sit-ins and picketing along with violent activity. The FACE Act is similar to the injunction in *Madsen,* where the Court struck down a 300 foot bubble zone around abortion clinics as not narrowly tailored. Moreover, the FACE Act does not leave open ample alternative channels, because it criminalizes peaceful sit-ins and picketing at the only place where the intended audience congregates or can even be found: the abortion clinics where the women go for abortions and the clinic workers go to perform them. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U.S. 147, 163 (1939). *Accord, Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556 (1975).

4. The *Madsen* Decision Does Not Justify the FACE Act's Broad Sweep over Speech

The *Madsen* decision upheld a 36 foot buffer on public property and a noise restriction, while striking down a 300 foot buffer for abortion clinics, a 36 foot buffer on private property, a ban on images or signs, and a 300 foot buffer for residences. The *Madsen* requirements arose from an injunction, with the protections that the injunctive process offers: a prior judicial determination of rights, a decree directed only at parties who committed prior actions that could be evaluated, and a specific dispute that gave rise to specific requirements, 112 S. Ct. at 2523, which "can be tailored by a trial judge to afford more precise relief." *Id.* at 2524. *Madsen* did not involve a *statute* that discriminated between pro-life protest and other protest. Justice Stevens noted that injunctions may impose requirements that general laws may not.[10] Even then, this Court held that the in-

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[10]"'The judicial remedy for a proven violation of law will often include commands that the law does

junction must "burden no more speech than necessary," *id.* at 2525, and said that "peaceful" speech was precisely what could not be burdened:

> But it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, *regardless of how peaceful* the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, *this provision cannot stand.* "As a general matter we have indicated that in public debate our own citizens must tolerate insulting, and *even outrageous, speech* in order to provide adequate breathing space to the freedoms protected by the First Amendment."

Id. at 2529. The FACE Act unconstitutionally prohibits the peaceful along with the violent, speech along with unprotected conduct, contrary to *Madsen*.

Most importantly, this Court held in *Madsen* that all but two elements of the injunction were invalid, whether or not they were content based provisions. *Id.* at 2529 n.6 ("We need not decide whether the 'images observable' and 'no-approach' provisions are content based."). Justice Stevens noted that "a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment." *Id.* at 2531 (Stevens, J., concurring). The present case brings that question of content discrimination before the Court.

II. THE FACE ACT DISCRIMINATES ON THE BASIS

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not impose on the community at large.'" *Id.* at 2531-32 (quoting Teachers v. Hudson, 475 U.S. 292, 309-10 n.22 (1986) (Stevens, J., concurring)).

OF VIEWPOINT IN VIOLATION OF THE FIRST AMENDMENT.
THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW, AND THE FOURTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS.

A. The FACE Act Amounts to Viewpoint Discrimination against Protected Speech on the Pro-Life View of Abortion. The Fourth Circuit's Decision Conflicts with This Court's Viewpoint Discrimination Test Under *R.A.V.* and Other Cases.

1. Viewpoint Discrimination in the FACE Act's Express Protections and Prohibitions

First, the name itself of the FACE Act -- the "Equal Access to *Clinic* Entrances" Act -- points to its discriminatory protection of abortion clinics. Its earlier incarnations expressly protected "abortion clinics" rather than euphemistic "reproductive health services." *See infra* II.A.4. There are no pro-life "clinics" -- only pro-choice "clinics."

Second, the criminal prohibitions of the FACE Act apply only to pro-life sit-ins and picketing, and not to pro-choice counterdemonstrators doing the same things:

> If pro-life protesters form a dense picket line obstructing an entrance with signs saying "Protect Life," and pro-choice protesters form an equally dense picket line across the same entrance with signs saying "Protect Choice," the first is a federal crime and the second is not.

> If a pro-life protester assaults a pro-choice protester, and a pro-choice protester assaults another pro-life protester, the first is a federal crime while the second is not, and the pro-choice protester has a federal civil right of action while the pro-life protester does not.

This discrimination arises from the "because" limita-

tion of the Act: it criminalizes "physical obstruction" that "interferes with" any person "*because* that person is . . . obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).

The "because" element does not "simply narrow[] its reach," as the Fourth Circuit held. *American Life League*, slip op. at 12, App. I at A-16. It "narrows" the FACE Act to only one viewpoint, the pro-life viewpoint. That is as discriminatory as a law criminalizing a lunch counter sit-in "because the lunch counter is providing food services," but not criminalizing injury to the civil rights protesters by the lunch counter owner's axe handle or bouncers (which does not involve providing food services). It is as discriminatory as a law criminalizing physical obstruction of a factory entrance "because the factory is providing employment," but not criminalizing the factory's binding and gagging the protesters or shooting at them to obstruct their labor picketing. Protections are given to the usual objects of sit-ins and picketing, but parallel protections are not given to the free speech demonstrators, by this "narrowing."

As in *R.A.V.*, Congress's selectivity raises the specter of government censorship of one side of the debate:

> St. Paul has not singled out an especially offensive *mode* of expression. . . . Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. *Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.*

112 S. Ct. at 2548-49.

Third, the private civil remedies of the FACE Act overtly cover only clinics and their pro-choice customers, not pro-life protesters:

> Such an action may be brought . . . only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services.

18 U.S.C. § 248(c)(1)(A). Thus, the Congressional Joint Explanatory Statement makes clear that "no cause of action is established for a person engaged in activities outside such a facility who uses the occasion to engage in prayer" -- even if that person is mercilessly beaten by abortion clinic personnel, police, or pro-choice counterdemonstrators. The legislative history studiously avoided the many examples of such brutality toward pro-life protesters.

2. Viewpoint Discrimination by False Superficial Neutrality between Real Speech and Imaginary Speech

More broadly, the FACE Act in practice criminalizes only one side of the pro-life and pro-choice debate, because only pro-life sit-ins and picketing occur at abortion clinics (not pro-choice ones), and no pro-choice sit-ins or picketing occur at pro-life clinics (because there are no such clinics) or pro-life crisis pregnancy centers (because pro-choice advocates do not oppose all birth or adoption). The pro-life position opposes nearly all abortions at abortion clinics, while the pro-choice position does not oppose the absence of abortions at pro-life centers and does not oppose some births and adoptions occurring through pro-life crisis pregnancy centers. Thus, the FACE Act is like the ordinance in *R.A.V.*:

> The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. . . . [The restriction] goes even beyond mere content discrimination, to actual *viewpoint discrimination*.

112 S.Ct. at 2547.

The Act in practice also severely restricts access to the pro-life speaker's intended audience: women having abortions and doctors performing abortions, at the only place they congregate or are even identifiable -- the abortion clinic. Restricting access to the intended audience is as unconstitutional as criminalizing environmental-related sit-ins only at old forest entrances, animal rights-related sit-ins only at university animal research laboratories, nuclear power-related sit-ins only at nuclear power plants, civil rights-related sit-ins only at segregated private clubs, or labor-related sit-ins only at factories, while not restricting other protests at the same places.

Thus, the FACE Act is indeed a "ruse" in its superficial appearance of viewpoint neutrality. In view of the actual lines of debate and of sit-ins, the FACE Act is no more neutral than any of the following:

> Criminalizing sit-ins on racial issues at lunch counters -- protests only occurred at the segregated lunch counters, not the integrated ones;
> Criminalizing sit-ins on racial issues on buses -- protests only occurred on segregated buses, not the integrated ones;
> Criminalizing picketing on employment issues in front of factories -- only labor protests occur at factories, and not any management protests;
> Criminalizing "interfere[nce] with the lawful taking of wildlife or . . . harass[ment of] another person who is engaged in the lawful taking" -- only hunters kill wildlife and not animal rights activists. *Dorman v. Satti*, 862 F.2d 432, 433 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989);
> Firing any employee for pregnancy -- only female employees can be pregnant.

Thus, the Second Circuit acknowledged that the facially neutral Hunter Harassment Act was really viewpoint discriminatory:

> Although the Act would appear by its terms to be content-neutral, it clearly is designed to protect hunters from conduct -- whether verbal or otherwise -- by those opposed to hunting . . . . [T]he Act "criminalizes a substantial amount of constitutionally protected speech."

Dorman, 862 F.2d at 437 (*quoting Houston v. Hill*, 482 U.S. 451, --- (1987)).

The "ruse" of superficial neutrality was indeed created at the last minute in Congress, when the term "abortion clinics" was changed to "reproductive health services" and other changes were made. However, the whitewash was not complete. The Conference Committee's "Findings and Purpose" continued to equate "reproductive health services" with "abortion-related services." H.R. Conf. Rep. No. 488, 103rd Cong., 2nd Sess. (1994), 1994 WL 168882 (Leg. Hist.) at *12. The Senate Committee on Labor stated that the law was needed because of "anti-abortion blockades . . . barring access to facilities that provide abortion services." S. Rep. No. 117, 103rd Cong., 1st Sess. 3 (1993). That phrase was reiterated frequently in the legislative history. *See infra* II.A.4. And the title of the FACE Act remained the "Freedom of Access to *Clinic* Entrances Act," rather than "Freedom of Access to *Reproductive Health Services* Act."

This Court has not hesitated to find viewpoint discrimination in similar circumstances, where government:

> Prohibited negative but not positive symbols about race, *R.A.V.*, 112 S. Ct. 2538;
> Prohibited negative but not positive expression about the flag, *Texas v. Johnson,* 491 U.S. 397;
> Left "Americans free to praise the war in Vietnam but . . . sen[t] persons like Schacht to prison for opposing it," *Schacht,* 398 U.S. at 63;
> Prohibited animal slaughter for religious purposes but not for food purposes. *Church of the*

> *Lukumi Babalu Aye, Inc. v. City of Hialeah,* --- U.S. ---, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

"Facial neutrality is not determinative." *Id.*, 113 S. Ct. at 2227.

3. Viewpoint Discrimination by Overtly Subordinating First Amendment Rights to Abortion Rights

Protests at abortion clinics are a classic case of the collision of two rights: the protesters' right of free speech and the clinics' and customers' right to abortion. The FACE Act makes a choice between these rights, so that free speech always will be subordinated and abortion rights always will prevail.

That choice conflicts with the "preferred freedom" status that speech has enjoyed for a half century, and it also conflicts with this Court's hierarchy of constitutional values:

> It would be most peculiar to accord [the right to abortion] that preferred position, since *it is much less explicitly protected by the Constitution than, for example, the right of free speech* rejected for such status in *Carpenters* [*v. Scott*, 463 U.S. 825, 833 (1983)].

Bray v. Alexandria Women's Health Clinic, --- U.S. ---, 113 S. Ct. 753, 764, 122 L. Ed. 2d 34 (1993).

4. Viewpoint Discrimination in the Prior Draft's Wording and Legislative History

The legislative history of the FACE Act is remarkably unambiguous that until the end the Act was directed at one thing and one thing only: restricting "anti-abortion" protesters and protecting "abortion clinics."

All versions of the bill, until the end, referred

to anti-abortion activities at abortion clinics. The House version complained that "a national strategy has emerged . . . of forcing doctors and others to stop performing abortions." H.R. Rep. No. 306, 103rd Cong., 1st Sess. (1993), 1993 WL 465093 (Leg. Hist.) at *20. The Senate similarly complained that "a nationwide campaign of anti-abortion blockades . . . is barring access to facilities that provide abortion services," S. Rep. No. 117, 103rd Cong., 1st Sess. 3 (1993), and that "anti-abortion groups have organized blockades designed to bar access to abortion facilities." *Id.* at 7. There was no discernible concern for pro-life buildings.

Rejected amendments show the same. Sen. Coats attempted to make the bill truly neutral, and his substitute bill to "punish[] interference with that access regardless of the motivation" was rejected. He protested that:

> we effectively condoned a form of *content discrimination* that *silences one side* of an important debate.

S. Rep. No. 117, 103rd Cong., 1st Sess. 45 (1993). In defense of his proposal, Sen. Coats gave the example of two groups involved in a protest at the same facility, one blocking the entrance for pro-life reasons and the other for some other reason. "[O]nly the group blocking access because of their pro-life motivation would be prosecuted and subject to the penalties of this act." *Id.* Sen. Kassebaum (a supporter) proposed that "Congress needs to broaden its view beyond the doors of abortion providers." *Id.* at 37.

All sponsors of the FACE Act said the same thing as Sen. Campbell: "this bill is aimed towards *antiabortion activists*." 140 Cong. Rec. S5595-03 (May 12, 1994) at S5605. Sen. Lautenberg understood the bill to make it a crime to hinder "abortion services." *Id.* Sen. Boxer found the bill necessary to "a woman's constitutional right to have an abortion." *Id.* at S5603. Rep. Nadler believed the bill would

"put a stop to the deliberate, orchestrated campaign by antichoice zealots." 140 Cong. Rec. H3116-03 (May 5, 1994) at H3126. Rep. Eschoo sought protection against "anti-choice extremists." *Id.* at H3130. Rep. Velazquez believed "pro-life extremists who . . . show a blatant disregard for the lives of those trying to deliver legal abortion services must be stopped now." *Id.* at H3131. Rep. Abercrombie targeted "antichoice fanatics." 140 Cong. Rec. E897-02 (1994) at E897.

B. The FACE Act Does Not Meet the *Boos* and *R.A.V.* Test of Strict Scrutiny, and the Fourth Circuit Erred in Applying Intermediate Scrutiny.

The strict scrutiny test applies to, and is not met by, the FACE Act's viewpoint discrimination, for the same reasons discussed for content discrimination. (Section I.B *supra.*)[11]

III. THE FACE ACT VIOLATES FIRST AMENDMENT RIGHTS BY PRIOR RESTRAINT IN ALLOWING FEDERAL AND STATE OFFICIALS TO BRING ACTIONS AGAINST PRO-LIFE PROTESTERS IF THE OFFICIALS BELIEVE THAT A PERSON "MAY BE" INJURED. THE FOURTH CIRCUIT

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[11]As the Court made clear in R.A.V., the government may not restrict even otherwise proscribable conduct (such as "fighting words" or obscenity or libel) if it does so from hostility toward the particular message being expressed. 112 S. Ct. at 2545. Thus, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 2543. Here, even if the FACE Act is interpreted more narrowly than it is written and is applied only to proscribable expression, it plainly and purposefully discriminates on the basis of the message expressed by the proscribable expression and is therefore still invalid.

WAS CORRECT IN FINDING THAT PROBLEMATIC, BUT ERRED IN REFUSING TO CONSIDER A FACIAL CHALLENGE.

The Act provides that the "Attorney General of the United States," and any "Attorney General of a State," "may commence a civil action in any appropriate United States District Court," if they merely have "reasonable cause to believe that any person or group of persons is being, has been, or *may be injured* by conduct constituting a violation of this section." 18 U.S.C. § 248(c)(2)-(3).

Such prosecutions would be unconstitutional prior restraints. *See Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). *See also Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *Grosjean v. American Press Co.*, 297 U.S. 233, 245-46 (1936).

The Fourth Circuit implicitly recognized that, in reversing the dismissal with prejudice and remanding for dismissal without prejudice. However, the Fourth Circuit erred in refusing to consider a facial challenge to a prior restraint. The whole focus of the prior restraint doctrine is that there should not be a prohibition on speech in advance, before a person has even exercised First Amendment rights.

IV. THE FACE ACT VIOLATES FIFTH AMENDMENT RIGHTS BY VAGUENESS AND OVERBREADTH AS A CRIMINAL LAW. THE FOURTH CIRCUIT ERRED IN FINDING THE TERMS UNAMBIGUOUS.

A. FACE'S Key Terms Are Vague and Overbroad.

1. "Interfere With" Is Vague and Overbroad.

The FACE Act merely defines "interfere with" to mean

"to restrict a person's freedom of movement." When coupled with the broad definition of "physical obstruction" (*infra*), the definition of "interfere with" is met by virtually anything a pro-life sit-in, picket line, sidewalk counselor, sidewalk preacher, or other peaceful protester might do. Consequently, this loose definition does not permit a reasonable person to know what protected speech and religious exercise in front of an abortion clinic is prohibited and what is permitted, and is therefore unconstitutional. *See Zwickler v. Koota*, 389 U.S. 241, 249 (1967).

2. "Physical Obstruction" Is Vague and Overbroad.

The Act effectively says that a demonstrator "physically obstructs" abortion clinic customers and workers by a sit-in or picket that blocks one of several entrances, or by blocking nothing but merely making entrance "unreasonably difficult" yet not "hazardous." 18 U.S.C. § 248(e)(4). The FACE Act is therefore unconstitutionally overbroad in prohibiting all sorts of First Amendment conduct, such as Mrs. Woodall's prayers.[12]

The Fourth Circuit's reliance on *Cameron v. Johnson*, 390 U.S. 611, 616 (1968), to uphold the Act's use of "physical obstruction" is misplaced. The protesters in *Cameron* did not challenge the vagueness of the term "obstruct," but only of the term "unreasonably," so the decision is not a holding that "obstruct" avoids vagueness and overbreadth. In addition, the only "physical obstruction" involved was making entry to and exit from the courthouse utterly "impossible," *Cameron v. Johnson*, 381 U.S. 741, 745 (1965) (Black, J., dissenting), so the decision cannot be taken as a holding that "rendering passage to or

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[12]If the Act's broad definition of "physical obstruction" means merely being forced to go around a protester, it is plainly unconstitutional. *See* Lee v. Int'l Society for Krishna Consciousness, Inc., --- U.S. ---, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992).

from such a facility . . . unreasonably difficult or hazardous" can be made criminal. An average protester has no way to know how many pickets may march before entrance becomes "unreasonably difficult," or how many doors a sit-in may block before entrance is "impassable," or whether sidewalk counselors and preachers render passage "unreasonably difficult." The penalty for guessing wrong is a federal criminal conviction.

3. "Force or Threat of Force" Is Vague and Overbroad.

The terms "force or threat of force" are not defined in the FACE Act, and unconstitutionally broaden it well beyond a proscription of violence or threats of violence (which undoubtedly can be proscribed neutrally). "Force" does not mean just "physical force," because the modifier "physical" is not used as it is for "physical obstruction." "Force" is defined by dictionaries to be not just physical, but psychological, intellectual, economic or other "power" in an effort to bring about change; it does not necessarily involve any violence at all. W. Morris, ed., *The American Heritage Dictionary of the English Language* 513 (1976). Under FACE, any demonstration of political or personal or group power by pro-life protesters -- whether by picketing, chanting, boycotting, rallying, etc. -- constitutes "force" that subjects the pro-life protesters to severe liability. Thus, pro-life protesters cannot know where the criminal line is to avoid crossing it.

4. "Injures" Is Vague and Overbroad.

"Injures" in § 248(a)(1) includes more than just bodily or physical injury, because the adjective "physical" is not used as it is for "obstruction." FACE sweeps within its coverage emotional injury, financial injury, and other forms of injury sure to be urged by those who seek to enforce FACE, subjecting even the most peaceful pro-life protester to lengthy imprisonment, massive fines, and large civil liability. Pro-life protesters cannot know what will constitute a proscribed "injury," and much legitimate

First Amendment activity is criminalized or at least chilled.

The problem with these terms' vagueness or overbreadth under the Due Process Clause of the Fifth Amendment is twofold. First, "physical obstruction," "interfere," and other challenged terms do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, "physical obstruction," "interfere," and other challenged terms lend themselves to arbitrary discriminatory enforcement. *Id.* Their vagueness and overbreadth produce an unconstitutional chilling effect on expression. *New York v. Ferber*, 458 U.S. 747, 772 (1982).

B. FACE Creates Uncertainty and Delegates Standardless Discretion.

FACE's vagueness and overbreadth leave government officials, as well as protesters, guessing about the application of FACE to particular conduct. It thus vests those officials with unbounded discretion about when the FACE Act applies or does not apply, to be determined by their own biases, which is unconstitutional. *Kolender v. Lawson*, 461 U.S. 352 (1983).[13]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Fourth Circuit Court of Appeals should be granted.

Dated February 21, 1995.

Respectfully submitted,

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[13]Quoting Smith v. Goguen, 415 U.S. 566, 575 (1974). *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Cox v. Louisiana, 379 U.S. 536 (1965); Largent v. Texas, 318 U.S. 418 (1943).

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APPENDIX

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APPENDIX I. FOURTH CIRCUIT OPINIONS

Woodall v. Reno, No. 94-1953

[FILED FEBRUARY 13, 1995]

Argued: November 3, 1994

Decided: February 13, 1995

Before HALL and MICHAEL, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded with instruction by published opinion. Judge Michael wrote the opinion, in which Judge Hall and Senior Judge Chapman joined.

COUNSEL

ARGUED: Wendell R. Bird, BIRD & ASSOCIATES, P.C., Atlanta, Georgia, for Appellants. Mark I. Levy, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for [*2]Appellees. ON BRIEF: David J. Myers, BIRD & ASSOCIATES, P.C., Atlanta, Georgia; William J. Olson, WILLIAM J. OLSON, P.C., McLean, Virginia, for Appellants. Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Mark B. Stem, Jonathan R. Siegel, Civil Division, Deval L. Patrick, Assistant Attorney General, William R. Yeomans, Counsel to the Assistant Attorney General, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

OPINION

MICHAEL, Circuit Judge:

Plaintiffs appeal the district court's order dismissing their complaint which raises a facial challenge on constitutional grounds to the Freedom of Access to Clinic Entrances Act (the Access Act or Act), Pub. L No. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248). We affirm in part, vacate the dismissal with prejudice of plaintiffs' prior restraint claim (Count V), and remand with the instruction to dismiss Count V without prejudice.

Plaintiff Joyce Woodall alleges that she prays peacefully in front of entrances to abortion clinics to discourage women from having abortions. She claims that her acts make her vulnerable to criminal prosecution under the Access Act. Plaintiff Concerned Women for America (CWA) alleges that it is "the nation's largest pro-family women's organization, with ... 600,000 members." CWA says that some of its members pray peacefully "in front of abortion clinic entrances and nonviolently discourage access to the entrances." Plaintiffs claim that the Access Act, particularly to the extent that it outlaws their peaceful obstruction of access to clinics, is an unconstitutional proscription on free speech.

This case was argued immediately after *American Life League, Inc. v. Reno*, No. 94-1869, ___ F.3d __ (4th Cir. 1994), a decision we also hand down today. Plaintiffs here make most of the arguments made by the plaintiffs in *American Life League*. Accordingly, to the extent plaintiffs here claim that the Access Act violates the First [*3]Amendment or is vague and overbroad, we reject their arguments and affirm on the reasoning of our opinion in *American Life League*.

Plaintiffs raise one issue not decided in *American Life League*. They argue that the Access Act is unconstitutional because its injunctive relief provisions authorize prior restraints on speech.

If the "Attorney General of the United States" or the "Attorney General of a State" has "reasonable cause" to believe that a person "is being, has been, or *may be* injured by conduct" violating the Access Act, the Act authorizes that Attorney General to file a civil action for injunctive relief. Act, § 3(c)(2)-(3) (emphasis added). Plaintiffs argue that this provision unconstitutionally authorizes prior restraint of expression against persons who "may" violate the Act by non-violent, physical obstruction.

Plaintiffs do not claim that they are presently subject to an injunction under the Access Act or that one is being sought against them. The government therefore argues that the prior restraint issue has been raised prematurely and should not be decided in this case.

We agree that the time is not right for consideration of this issue. We have no factual record of an actual or threatened application of the Access Act's injunctive relief provisions. Moreover, we will not assume that a court would issue an injunction in violation of the wellestablished prior restraint doctrine. *See, e.g., New York Times Co. v. United States* (the Pentagon Papers Case), 403 U.S. 713 (1971) (per curiam); *see also Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994). The record before us is insufficient to present the prior restraint issue in a "clean-cut and concrete form." *Renne v. Geary*, 111 S.Ct. 2331, 2339 (1991). Accordingly, we believe consideration of this issue should be defeffed until a more concrete controversy arises. *See id.*; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303-304 (1979).

For the reasons stated above and in *American Life League*, the district court's dismissal order is affirmed with one exception. The order is vacated to the extent that it dismissed Count V of plaintiffs' [*4]complaint (relating to prior restraint) with prejudice. We remand with the instruction to dismiss Count

V without prejudice.

AFFIRMED IN PART, VACATED IN PART,
AND REMANDED WITH INSTRUCTION

American Life League v. Reno, No. 94-1869

[FILED FEBRUARY 13, 1995]

Argued: November 3, 1994

Decided: February 13, 1995

Before HALL and MICHAEL, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

[*2]Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Hall and Senior Judge Chapman joined.

COUNSEL

ARGUED: Marion Edwyn Harrison, LAW OFFICES OF MARION EDWYN HARRISON, Falls Church , Virginia, for Appellants. Mark I. Levy, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Deborah A. Ellis, NOW LEGAL DEFENSE AND EDUCATION FUND, New York, New York, for Appellees. **ON BRIEF:** Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Mark B. Stern, Jonathan R. Siegel, Civil Division, Deval L. Patrick, Assistant Attorney General, William R. Yeomans, Counsel to the Assistant Attorney General, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Martha F. Davis, NOW LEGAL DEFENSE AND EDUCATION FUND, New York, New York; Catherine Albisa, CENTER FOR REPRODUCTIVE LAW & POLICY, New York, New York, for Appellees. Catherine Weiss, Louise Melling, Karen Leiter, Reproductive Freedom Project, Steven R. Shapiro, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Stephen B. Pershing, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, Richmond, Virginia, for Amici Curiae.

OPINION

MICHAEL, Circuit Judge:

Plaintiffs, the American Life League, Inc. and five individuals, all actively opposed to abortion, appeal from a judgment upholding the validity of the Freedom of Access to Clinic Entrances Act Of 1994 (the Access Act or Act), Pub. L. No. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248). We affirm.

In affirming we first conclude that the Access Act is within the commerce power of Congress and that congressional action here was [*3] not barred by principles of federalism. Second, we decide that the Act does not violate the First Amendment's Free Speech Clause. The Act targets unprotected activities, such as violence and clinic blockades. However, to the extent that the Act might incidentally proscribe some conduct with expressive elements (such as peaceful but obstructive picketing), we examine it under the First Amendment. Because we find that the Act is content and viewpoint neutral, we subject it to intermediate scrutiny. Under that level of scrutiny we conclude that the Act serves substantial government interests, that it is not aimed at expression, and that it is narrowly tailored. We also conclude that the Act is neither overbroad nor vague. The Act's liquidated damages provision also withstands the First Amendment challenge. Third, we conclude that the Act does not violate the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4.

I.

On May 26, 1994, the same day the President signed the Access Act into law, plaintiffs filed this action to challenge it in the United States District Court for the Eastern District of Virginia.

Plaintiffs allege the following in their second amended complaint. Plaintiff American Life League, Inc. (ALL) conducts educational and legislative activities "relating to the human rights of persons born and unborn." The five individual plaintiffs, Antoinette C.

Cleary, David G. P. Englefield, Patricia Lohman, Patricia Savino and the Reverend Gerald Weymes, all oppose abortion "upon theological, moral and other grounds." The Reverend Mr. Weymes has often prayed near clinics that perform abortions. The other individual plaintiffs and some ALL members have "demonstrated, prayed and sidewalk-counseled within the vicinity of abortion clinics." Plaintiffs' activities have been peaceable, and they do not condone "nonpeaceable or violent conduct." Their actions, however, have physically obstructed access to abortion clinics.

Plaintiffs also allege that their continuing anti-abortion activities put them in jeopardy of violating the Access Act. They claim that the Act, by outlawing their activities, violates the Constitution and RFRA.
[*4]

Plaintiffs brought this action against Janet Reno, Attorney General of the United States. The district court allowed five additional defendants to intervene: the National Abortion Federation; the National Organization for Women; Commonwealth Women's Clinic and Capitol Women's Center, two reproductive health clinics that provide counseling, birth control advice, contraceptives, medicine, pre-natal care and abortions; and Dr. George Tiller and Dr. Susan Wickland, two physicians who perform abortions. The district court accepted (as did we) an amicus brief from the American Civil Liberties Union and the ACLU Foundation of Virginia.

On June 1, 1994, five days after the complaint was filed, the Attorney General filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court acted with dispatch, holding a hearing on June 10, 1994, and issuing an opinion and order dismissing the second amended complaint with prejudice on June 16, 1994. *See American Life League, Inc. v. Reno*, 855 F. Supp. 137 (E.D. Va. 1994). Plaintiffs now appeal that order.

II.

Congress passed the Access Act in response to protracted and nationwide violence and access obstruction at facilities providing abortions. Between 1977 and early 1993, more than 1,000 acts of violence against abortion providers and more than 6,000 clinic blockades were reported in the United States. S. Rep. 117, 103d Cong. 1st Sess. 31 (1993); H. R. Rep. No. 306, 103d Cong. 2d Sess. 6-7 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699, 703. "These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder." *Id.* Congress concluded that state and local law enforcement agencies were often unable and sometimes unwilling to protect the patients and staffs of these clinics from violence and severe disruption. S. Rep. No. 117 at 3, 18-21; H. R. Rep. No. 306 at 10.

The Access Act aims to protect and promote public safety and health "by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking [*5] to obtain or provide reproductive health services." Act, § 2. To that end the Act provides criminal and civil penalties against anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services ....

Act, § 3(a).[1]

---

[1]The Act also prohibits the same activities if

The Access Act defines its key terms. Act, § 3(e). The term "interfere with" means "to restrict a person's freedom of movement." "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another.'' "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services..., or rendering passage to or from such a facility...unreasonably difficult or hazardous." "Reproductive health services" means "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."

The Act also provides a rule of construction: "[nlothing in this section shall be construed -- (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) pro-[*6]tected from legal prohibition by the First Amendment to the Constitution." Act, § 3(d).

The criminal penalties prescribed by the Act vary with the nature of the violation. For example, a first offense involving only a nonviolent physical obstruction carries a penalty of imprisonment for not more than six months or a fine of not more than $10,000. An offense resulting in death carries a penalty of imprisonment for any term of years or for life. Act, § 3(b).

The civil remedies prescribed by the Act include injunctive relief, compensatory or statutory damages ($5,000 per violation), punitive damages, and costs and fees. Act, § 3(c). These civil remedies are available

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directed at (i) any person lawfully exercising or seeking to exercise the right of religious freedom at a place of religious worship or (ii) the property of a place of religious worship. Act, § 3(a). Those portions of the Act are not at issue in this case.

to any person injured in providing or obtaining services at a reproductive health facility. Finally, the Act also authorizes civil actions by the Attorney General of the United States or any State Attorney General. *Id.*

We turn now to plaintiffs' several challenges to the Act.

III.

A.

As a threshold matter plaintiffs argue that Congress lacks the power to pass the Access Act. The Act identifies the Commerce Clause and section 5 of the Fourteenth Amendment as the sources of congressional power in this instance. Act, § 2. We conclude that the commerce power permits Congress to regulate activities affecting reproductive health services. As a result, we need not reach plaintiffs' argument that section 5 of the Fourteenth Amendment does not provide Congress with authority.

A federal statute is valid under the Commerce Clause if Congress (1) rationally concluded that the regulated activity affects interstate commerce and (2) chose a regulatory means reasonably adapted to a permissible end. *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 276 (1981).
[*7]
Based on an extensive legislative record, Congress rationally concluded that violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce. Congress marshaled, among others, the following facts to establish the interstate connection. Many women travel across state lines to seek reproductive health care. S. Rep. 117, 103d Cong. 1st Sess. 31 (1993); H. R. Conf. Rep. No. 488, 103d Cong. 2d Sess. 7 (1994) *reprinted in* 1994 U.S.C.C.A.N. 724. Reproductive health facilities engage doctors and other staff in an interstate market. For example, Dr.

David Gunn, who was murdered in Florida in 1993, performed abortions in several states. S. Rep. No. 117 at 3; H. R. Rep. No. 306, 103d Cong. 2d Sess. 6-7 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699, 704. These facilities buy medical and office supplies that move in interstate commerce. S. Rep. No. 117 at 3; H. R. Conf. Rep. No. 488 at 7. "[C]linics have been closed because of blockades and sabotage and have been rendered unable to provide services." S. Rep. No. 117 at 31. From these facts Congress concluded that interstate commerce was threatened. S. Rep. No. 117 at 31; H. R. Rep. No. 306 at 8-9.

Congress also chose regulatory means reasonably adapted to permissible ends. The Act's criminal and civil penalties are designed to deter violent, obstructive and destructive conduct. The penalties are reasonably adapted to the Act's following permissible ends: (1) protecting the free flow of goods and services in commerce, (2) protecting patients in their use of the lawful services of reproductive health facilities, (3) protecting women when they exercise their constitutional right to choose an abortion, (4) protecting the safety of reproductive health care providers, and (5) protecting reproductive health care facilities from physical destruction and damage.

Together, these findings, these means and these objectives are more than ample to justify Congress's invocation of the commerce power. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

B.

In a final, brief subpoint under their argument that "there is no constitutional authority for [the Access Act]," plaintiffs urge us to reject [*8] the Act as an unwarranted "incursion upon federalism and the federal judiciary." Brief for Appellants at 39, 44. First, plaintiffs suggest that any public safety problems at reproductive health facilities should be handled under existing state laws. Second, they express

concern that the Access Act gives federal courts "undue jurisdiction" and will add a flood of new cases to already crowded federal dockets. We must reject these arguments. Congress, not the courts, determines the need for new federal laws. And Congress, subject only to Article III of the Constitution, establishes the jurisdiction of the inferior federal courts. *See, e.g., Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850).

IV.

A.

The Constitution ordains that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. Plaintiffs claim that the Access Act abridges this freedom.

We begin our consideration of plaintiffs' freedom of speech claims by repeating the elements of a basic offense under the Act. A violator must (1) "by force or threat of force or by physical obstruction," (2) "intentionally injure[], intimidate[], or interfere[] ... with any person," (3) "because that person [the victim] is ... obtaining or providing reproductive health services." Act, § 3(a).

The government's first defense is that the Act does not implicate the First Amendment at all; rather, it regulates conduct that is outside the First Amendment. According to the government, the Act leaves plaintiffs free to engage in any form of protected speech they choose.

In many respects the government is correct. The Access Act does not prohibit protestors from praying, chanting, counseling, carrying signs, distributing handbills or otherwise expressing opposition to abortion, so long as these activities are carried out in a non-violent, non-obstructive manner. What the Act does prohibit is force, the threat of force and physical ob-

struction intended to deprive someone of the lawful right to use or provide reproductive health services.
[*9]

The use of force or violence is outside the scope of First Amendment protection. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993) ("a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). True threats of force also lie outside the First Amendment. *Watts v. United States*, 394 U.S. 705, 707 (1969) (holding that "[w]hat is a threat must be distinguished from what is constitutionally protected speech"); *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546-47 (1992). Finally, certain physical obstructions, such as a blockade of pedestrian traffic, are not protected by the First Amendment. *See Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (holding that a statute which prohibited unreasonable interference with access to a courthouse was a "valid law ... and the fact that free speech is intermingled with such conduct does not bring with it constitutional protection").

Thus, the Act does target unprotected activities. But the Act cannot escape First Amendment scrutiny entirely. The Act might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing. The right to peaceful protest lies near the heart of the freedom of speech. Accordingly, we examine the Act under the First Amendment.

B.

The first step in our First Amendment inquiry is to determine whether the Act is content and viewpoint neutral. Plaintiffs argue that the Act is a content- or viewpoint-based restriction because it outlaws conduct for its anti-abortion message. If plaintiffs are correct, then we subject the Act to strict scrutiny. To pass this test a law must be necessary to serve compelling govemmental interests by the least restrictive means available. *See, e.g., R.A.V.*, 112 S. Ct. at 2549-50 (1992); *Burson v. Freeman*, 112 S. Ct. 1846,

1851 (1992) (plurality). If plaintiffs are incorrect, if the Act is content and viewpoint neutral, then we subject it to intermediate scrutiny. To pass this test a law must be narrowly tailored to serve substantial governmental interests. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The neutrality inquiry does not focus on the motive of the violator. Rather, a statute regulating expressive conduct is neutral if it is justi-[*10]fied without reference to the content of the violator's message or point of view. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2523-24 (1994); *Ward*, 491 U.S. at 791. Congress's purpose is the main consideration. *Id.*

The Access Act identifies its purpose in plain language:

> the purpose of this Act [is] to protect and promote public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services.

Act, § 2. The Act also includes rules of construction:

> Nothing in this section shall be construed--
>
> (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;
>
> (2) to create any new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regard-

less of the point of view expressed ....

Act, § 3(d). Together, the Act's statement of purpose and rules of construction indicate that the Act was not passed to outlaw conduct because it expresses an idea. Instead, Congress passed the Act to promote public safety and health and to protect interstate commerce from disruption.

Plaintiffs insist that these lofty statements of purpose and construction are subterfuge. They say Congress really intended to "suppress only the anti-abortion side of a fierce national debate." Brief for Appellants at 8. This argument ignores the Act's substantive provi-[*11]sions. These unambiguous provisions do not target any message based on content or viewpoint.

The Act protects reproductive health services and those who use and provide them. Reproductive health services embrace "medical, surgical, counseling, or referral services relating to the human reproductive system." Act, § 3(e). The Act thus protects access to all reproductive health services, including both abortion and services connected with carrying a fetus to term. It applies, for example, to facilities opposing abortion and to facilities offering pregnant women counseling about alternatives to abortion. For example, AAA Women for Choice, Inc., a facility run by plaintiff Patricia Lohman, would be protected. AAA Women for Choice offers "counsel, comfort and alternatives other than abortion to pregnant women." Second Amended Complaint at ¶ 6.

Moreover, the Act punishes anyone who engages in the prohibited conduct. For example, anyone who, with the requisite intent, blocks a person from entering a facility to obtain or provide reproductive health services violates the Act. The viewpoint of the obstructer is irrelevant. The Act forbids the obstructive conduct not because of the content of any message that conduct might convey, but because of its harmful effects.

Plaintiffs press on and say that the Act's apparent neutrality is not enough. They charge that the inclusion of protection for anti-abortion services is a ruse to make the Act look neutral. In reality, they argue, the Act aims to suppress the anti-abortion movement. They note that one is a wrongdoer under the Act only when he commits the proscribed conduct because the victim is obtaining or providing reproductive health services. The "because" element is the Act's Achilles's heel, according to plaintiffs. They say only people who oppose abortion will be punished under the Act; those who protest at reproductive health facilities for reasons unrelated to the abortion issue will never violate the law. As examples, plaintiffs say those protesting at clinics on labor and environmental issues would not violate the Act. On this basis plaintiffs conclude that the Act is aimed at their motives for protesting and thus at their message and its viewpoint.

This lack-of-neutrality argument overlooks the distinction between what the Act does and does not regulate. Again, the Act does not pro-[*12]hibit peaceful protestors from praying, chanting, counseling, carrying signs, distributing handbills, or otherwise expressing their opposition to abortion. What the Act does prohibit is force, the threat of force, and physical obstruction, when carried out because a person is using or providing reproductive health services. The "because" or motive element does not render the Act content or viewpoint based. As we explain below, the Act's motive requirement simply narrows its reach, and this narrowing is within congressional prerogative.

In *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), the Supreme Court upheld a Wisconsin law that enhanced the sentence for the crime of aggravated battery when the defendant intentionally selected his victim because of the victim's race. Just like plaintiffs here, the defendant argued that he was being punished for his motive for acting. The unanimous Supreme Court rejected that argument, saying "[m]otive plays the same role under the Wisconsin statute as it does under the federal and state anti-discrimination laws, which we

have previously upheld against constitutional challenge." *Id.* at 2200. The Court reasoned that "the penalty-enhancement statute [was] aimed at conduct unprotected by the First Amendment." *Id.* at 2201. Thus, Wisconsin's statute did not target conduct on the basis of its expressive elements. Mitchell's conclusion was consistent with the Supreme Court's prior recognition that "where government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2546-47 (1992).

As the Supreme Court observed in both *Mitchell* and *R.A.V.*, the distinction between targeting the expressive elements of conduct and targeting the proscribable elements of conduct undergirds many federal laws. For example, Title VII includes a motive requirement. Title VII makes it unlawful for an employer to discriminate against an employee "*because* of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 20OOe-2(a)(1) (emphasis added). The Supreme Court has held that Title VII does not infringe an employer's First Amendment rights. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Another example is a provision in the Fair Housing Act that prohibits using force or the threat of force to injure, intimidate, or interfere with a person "*because*" he is participating in certain housing programs. 42 U.S.C. § 3631 (emphasis added). That provision, [*13] despite its motive requirement, has been upheld as a content- and viewpoint-neutral regulation. *United States v. Hayward*, 6 F.3d 1241, 1249-51 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994); *United States v. Gilbert*, 813 F.2d 1523, 1529-31 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).[2]

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[2]*See also, e.g.*, 18 U.S.C. § 245(b) (making it a crime to use "force or threat of force [to] willfully injure[ ], intimidate[ ], or interfere[ ] with . . . any person *because*" that person is voting or working for the federal government) (emphasis added); and 42 U.S.C. § 1971(b) (Voting Rights Act)

Thus, Congress may enact laws to punish proscribable conduct even though the conduct is motivated by certain biases or beliefs. More important for this case, Congress can exercise its prerogative to single out and address "conduct thought to inflict greater individual and societal harm" by using a motive requirement to narrow the reach of a law. *Mitchell*, 113 S. Ct. at 2201; *see FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2102-03 (1993). Indeed, in passing the Access Act Congress determined that intentional interference with access to reproductive health services is more damaging to federal interests than activity that affects such access only incidentally, *e.g.*, labor or environmental protesting. We repeat, Congress may choose to legislate only against actions it considers to be more serious. Moreover, a statute is not rendered non-neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct. *See United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War).

For these reasons, we find that the Access Act is content and viewpoint neutral. The Act is justified without reference to the violator's viewpoint or the content of his message. Therefore, we subject the Act to intermediate scrutiny.
[*14]

C.

Intermediate scrutiny is required when a statute potentially regulates conduct that has protected expressive elements. The intermediate scrutiny test was first enunciated by the Supreme Court in *O'Brien*.

(providing that no person "shall intimidate, threaten, [or] coerce . . . *for the purpose of* interfering with" a person's right to vote) (emphasis added).

O'Brien was convicted under a federal statute which made it a crime to destroy a draft card knowingly. In the Supreme Court O'Brien argued that his "act of burning his [draft card] was protected 'symbolic speech' within the First Amendment." *O'Brien*, 391 U.S. at 376. The Supreme Court upheld the conviction, noting that Congress could regulate conduct that has an expressive element, given sufficient justification:

> even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a [draft card] is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id. The Court then laid down a test for reviewing a statute, such as the Access Act, that may incidentally affect speech as it regulates conduct. Under *O'Brien*'s test such a statute passes constitutional muster "if it [1] furthers an important or substantial governmental interest; if [2] the governmental interest is unrelated to the suppression of free expression; and if [3] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

1.

O'Brien's first prong asks whether the Act furthers important or substantial government interests. For easier discussion we group the several interests suggested by the government.
[*15]
One group relates to protecting public health, safety and commerce. This interest includes protecting patients and staff from violence and harm and protecting reproductive health facilities from physical destruction or damage. It also includes protecting interstate

patient traffic and the interstate market for the services of doctors, nurses, counselors, and other staff.

A second group of interests relates to protecting women and men from violence and threats in the exercise of their rights. The Supreme Court has recognized that government "has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2526 (1994). This freedom includes the constitutional right to terminate a pregnancy. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Also, both women and men have the constitutional right to obtain and use contraceptives. *See Eisenstadt v. Baird*, 405 U.S. 438, 440, 446 (1972); *Casey*, 112 S. Ct. at 2807. They should be able to use reproductive health facilities to exercise this right.

Together, or separately, these interests are significant. The govemment has a substantial interest in acting to protect them, as Congress did by passing the Access Act.

2.

O'Brien next asks whether the govemment's interests relate to suppressing free expression. This analysis is essentially the same as the content- and viewpoint-neutrality test we applied earlier. *See* IV.B., *supra*. We concluded that the Act was justified without reference to the message or viewpoint of anyone who might violate it. Relying on the Act's plain language, we also noted that its purpose was not related to suppressing expression. Instead, we found that the Act outlawed certain actions because of their harmful effects. We next rejected plaintiffs' contention that the Act's avowed purpose shrouded an illicit purpose. We believe this analysis is sufficient for the Act to pass the second prong of the *O'Brien*

test.[3]
[*16]

3.

Under *O'Brien*'s third prong we consider whether the incidental restriction on alleged First Amendment freedoms is no greater than required to meet the govemment's interests. This has been interpreted as a requirement for "narrow tailoring." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The statute must not "burden substantially more speech than is necessary to further the govemment's legitimate interests." *Id.*

The Act meets this standard. Much of the conduct (force and violence) outlawed under the Act lacks any protected expressive element at all. Of course, peaceful but obstructive protesting, which plaintiffs argue has expressive elements, could run afoul of the Act. For example, protesters blocking a clinic door as they pray might violate the Act's prohibition on physical obstruction. However, such a violation would be simply a consequence of the govemment's lawful aim to protect access to reproductive health services. And the Act proscribes no more expressive conduct than necessary to protect safe and reliable access to reproductive health services. After all, the Act leaves open ample alternative means for communication. In a non-violent, nonobstructive manner, protestors may still stand outside reproductive health facilities and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills,

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[3]We add a comment here about the govemment's acknowledgment that "the national campaign of violent and obstructive pro-life protests was the catalyst that led to passage of the Act." Brief for Appellee United States at 22 n.7. This acknowledgment does not mean that Congress acted to curb protected expression. Protecting reproductive health facilities, patients, and providers is a legal purpose, unrelated to suppressing free expression.

symbolic gestures and other expressive means.[4]

4.

In sum, the Access Act serves substantial government interests such as preventing violence, preserving public access to reproductive health services, and protecting citizens in their exercise of constitu-[*17]tional rights. It is not aimed at expression, and it is narrowly tailored. It passes *O'Brien's* test.

D.

Plaintiffs next assert that the Act is unconstitutionally overbroad and vague. They claim that "[tlhousands of persons who daily engage in peaceful activities around abortion clinics now risk arrest [and] prosecution" for exercising their First Amendment rights. Brief for Appellants at 29. They specifically point to "sign-carrying . . . and rosary-carrying processions outside clinics." *Id.* at 28. Plaintiffs' argument is this: the Act's alleged overbreadth and vagueness will have a "chilling effect" on such activities.

As for overbreadth, "[olnly a statute that is substantially overbroad may be invalidated on its face." *Houston v. Hill*, 482 U.S. 451, 458 (1987) (citations omitted). Such an invalid statute proscribes so much protected speech that it must be struck down entirely. Accordingly, the overbreadth doctrine is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Even though the Act might be applied to some protected expression, such as peaceful picketing, that picketing would be prohibited only in the

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[4]Our conclusion that the Act is narrowly tailored is also supported by the reasoning that compels us not to apply the overbreadth doctrine. *See* IV.D., *infra*.

most narrow and justifiable circumstances. Under the Act, "physical obstruction" involves intentionally "rendering impassable ingress or egress from a facility ... or rendering passage to or from such a facility ... unreasonably difficult or hazardous." Act, § 3(e)(4). Thus, it is difficult to see how the Act is substantially overbroad in relation to its legitimate scope of outlawing violence and barriers to access.

The vagueness doctrine is concerned with clarity. A statute is unconstitutionally vague if it does not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited...." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine protects both free speech and due process values.

The Access Act's anti-obstruction provisions closely resemble a statute the Supreme Court upheld against a vagueness challenge in *Cameron v. Johnson*, 390 U.S. 611 (1968). In *Cameron* arrested civil [*18] rights protestors challenged Mississippi's Anti-Picketing Law, which provided:

> 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises ....

Id. at 613. The Supreme Court rejected the vagueness challenge on the grounds that the terms "obstruct," "unreasonably" and "interfere with" were perfectly clear, widely used, and well understood. According to the Court, the statute "precisely delineates its reach in words of common understanding." *Id.* at 616.

Like the Anti-Picketing Law upheld in *Cameron*, the Act here speaks in clear, common words. Moreover, the Act goes beyond the statute in *Cameron* by defining many of its terms. The Act defines "interfere with" to mean "restrict a person's freedom of move-

ment." Act, § 3(e)(2). It defines "intimidate" to mean "place a person in reasonable apprehension of bodily harm...." Act, § 3(e)(3). These and other narrowing definitions in the Act should inform those opposed to abortion that they will not offend this law by peaceful, nonobstructive picketing.

We conclude that the Access Act is neither overbroad nor vague.

E.

Plaintiffs' final freedom of expression challenge to the Access Act concerns a civil damage provision. The Act authorizes injured persons to file private actions, and it permits them to elect to recover $5,000 per violation in lieu of actual damages. Act, § 3(c). Plaintiffs claim that this damage provision is unconstitutional under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Specifically, plaintiffs say that under *Claiborne Hardware* only *actual* damages caused by unprotected conduct may be recovered. But that is not what *Claiborne Hardware* says. *Claiborne Hardware* [*19] involved a money judgment imposing joint and several liability against ninety-two participants in a mass boycott of white-owned businesses. The Supreme Court addressed whether all members of the group could be held liable for the violent acts of a few. "Civil liability may not be imposed merely because an individual belonged to a group," the Court said. *Id.* at 920. The Court did not consider what the constitutional measure of damages might be after a defendant was found liable for an unprotected act.

The Act here does not subject anyone to damages caused by protected expression. It does subject violators to limited liquidated damages for unprotected conduct. We know of no rule prohibiting a liquidated damages provision that may in a particular case impose

more than actual damages for unprotected activity.[5]

V.

Plaintiffs' last claims concern protections afforded religion. Specifically, they argue that the Access Act offends the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4.

A.

The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. Const. amend. 1. The clause forbids government from adopting laws designed to suppress religious belief or practice. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, 2222 (1993). However, a neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990).

Relying on *Church of Lukumi Babalu Aye*, plaintiffs claim that the Access Act violates the Free Exercise Clause. They say it aims to [*20] restrict nonviolent protest because of the protestors' religious motivation. In *Church of Lukumi Babalu Aye* the Supreme Court examined city ordinances aimed at suppressing the Santeria religion. The ordinances prohibited ritual animal slaughter, a Santeria religious practice. The ordinances carefully outlawed *only* animal sacrifice and the possession of animals for sacrificial purposes. They did not outlaw hunting, fishing, or the killing of animals for food. In short, the ordinances accomplished a religious gerrymander. They singled out religious practices for discriminatory treatment. The

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[5]The reasonableness of the amount ($5,000) of the liquidated damages per violation is not at issue here.

Supreme Court subjected the ordinances to the same level of exacting (strict) scrutiny it applies to content-based restrictions on speech. *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2233-34. The ordinances were held unconstitutional.

By contrast, the Access Act punishes conduct for the harm it causes, not because the conduct is religiously motivated. *See* IV.B., *supra*. By necessity, then, the Act does not punish religious belief. It proscribes violent, forceful or threatening conduct without regard to expressive content or viewpoint. *See* IV.B., *supra*. Under the Act it makes no difference whether a violator acts on the basis of religious conviction or temporal views. The same conduct is outlawed for all. Therefore, the Act is a generally applicable law, neutral toward religion. It does not offend the First Amendment's Free Exercise Clause.

B.

The Religious Freedom Restoration Act (RFRA) mandates that government shall not "substantially burden a person's exercise of religion" unless the government demonstrates that the burden furthers a compelling governmental interest" by the "least restrictive means." 42 U.S.C. § 2000bb-1.

The Access Act and RFRA were passed by the same Congress, but RFRA was passed first. RFRA's rule of construction says that federal statutes enacted after RFRA are subject to its provisions unless the later statute "explicitly excludes [RFRA's] application by reference to [the RFRA statute]." *Id.* at § 2000bb-3(b). The Access Act does not exclude RFRA's application, so we examine plaintiffs' claim that the Access Act violates RFRA.

[*21]

The threshold inquiry under RFRA concerns burden. If a statute does not substantially burden a religious practice, then the statute does not implicate RFRA.

Plaintiffs' complaint alleges that they do not

"condone . . . nonpeaceable or violent conduct." Accordingly, a proscription on violence and force cannot substantially burden their religious exercise. However, plaintiffs' complaint also alleges that their opposition to abortion (on religious grounds) requires them to obstruct physically, through peaceful picketing, access to clinics offering abortion services. We will assume that this allegation, coupled with plaintiffs' assertion that the Access Act violates their RFRA rights, satisfies their obligation to plead a substantial burden on their religious exercise. *See* Fed. R. Civ. P. 8. This requires us to move to RFRA's next level: an examination of whether the alleged substantial burden imposed by the Access Act furthers a "compelling governmental interest" by the "least restrictive means" available.

We begin with some background. Congress passed RFRA as a response to *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1989). The "findings" section of RFRA states that Smith "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a). The "purpose" section adds that RFRA aims "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *Id.* at § 2000bb(b).[6]

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[6]RFRA contemplates that courts will rely on cases decided prior to *Smith* when applying the statute's compelling interest standard. *See* 42 U.S.C. § 2000bb(a)(5) (finding that the "compelling interest test as set forth in prior Federal court rulings [prior to *Smith*] is a workable test"); S. Rep. 111, 103d Cong. 1st. Sess. 8 *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 (noting that the "committee expects that courts will look to free exercise cases decided prior to *Smith* for guidance"); *id.* at 9 (stating that "the compelling interest generally should not be construed more stringently or more leniently than it was prior to *Smith*") (footnote omitted).

[*22]

In *Sherbert* South Carolina denied unemployment benefits to a Seventh-day Adventist fired for refusing to work on her Sabbath. The Supreme Court reversed. It found uncompelling South Carolina's asserted interest in deterring "unscrupulous claimants feigning religious objections to Saturday work." *Sherbert*, 374 U.S. at 407. In *Yoder* Wisconsin convicted three Amish parents for refusing to send their children to school beyond the eighth grade. Wisconsin's highest court reversed the convictions, and that result stood in the United States Supreme Court. Wisconsin's asserted interest of preparing self-reliant citizens for participation in society was rejected as uncompelling by the Supreme Court. The Amish had introduced convincing evidence that accommodating their religious objections by excusing a year or two of compulsory schooling would not impair the physical or mental health of the children or undermine their ability to be self-supporting and good citizens. *Yoder*, 406 U.S. at 221-29. In both *Sherbert* and *Yoder* the Supreme Court carefully distinguished cases involving the govemment's paramount interest in protecting physical or mental health, public safety, or public welfare. *Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 230. In addition, *Sherbert* noted that religious accommodation could be denied when the accommodation, by allowing nonuniform treatment, presented a problem of sufficient magnitude to render a statutory scheme unworkable. *Sherbert*, 374 U.S. at 408-09.

In Free Exercise Clause decisions cited by or following *Sherbert*, the Supreme Court has recognized these compelling governmental interests in a variety of situations. For instance, the Court found the need for uniformity paramount in a case requiring an Amish employer to pay Social Security taxes for Amish employees, *United States v. Lee*, 455 U.S. 252, 258-59 (1982), and in a case denying Jewish servicemen the right to wear a yarmulke, *Goldman v. Weinberger*, 475 U.S. 503, 508-510 (1986). It found public welfare paramount in a case enforcing the draft against persons who considered a particular war "unjust," *Gillette v.*

United States, 401 U.S. 437, 462 (1971), and in a case denying tax exemptions to educational institutions with racially discriminatory policies, *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). The Court found the public health and safety interest decisive in upholding mandatory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),[7] and in enforcing [*23]child labor laws, *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944) (finding that a state's interest in protecting health justified prohibiting a nine-year-old Jehovah's Witness from distributing religious literature).

Finally, we do not think the Free Exercise Clause shields conduct violating a criminal law that protects people and property from physical harm. *Cf. Reynolds v. United States*, 98 U.S. (8 Otto) 145, 166 (1878) (posing the following rhetorical question: "[s]uppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

With this backround in mind we measure the Access Act against RFRA. First, we believe the Access Act serves sufficiently compelling governmental interests. After all, the Act protects public health by promoting unobstructed access to reproductive health facilities. It also protects public safety by proscribing all violent, threatening or obstructive conduct specifically aimed at patients and providers of reproductive health services.

Second, we believe the Access Act is sufficiently narrow. The Act's prohibitions are directed only to those actions Congress found to be a national problem, specifically force, threat of force and physical obstruc-

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[7]Jacobson did not explicitly address the Free Exercise Clause. It did, however, discuss fundamental "liberty" interests. 197 U.S. at 26-27 and 38-39. *Sherbert*, 374 U.S. at 403, and *Yoder*, 406 U.S. at 230, construe Jacobson as a health and safety case.

tion. The Act does not sweep within its prohibitions activity unrelated to the serious trouble Congress sought to address.

We conclude that the Access Act serves sufficiently compelling government interests by the least restrictive means available. It therefore does not violate RFRA.

VI.

"There are manifold restraints to which every person is necessarily subject for the common good. On any other basis oroanized society could not exist with safety to its members." *Jacobson v.* [*24] *Massachusetts*, 197 U.S. 11, 26 (1905) (Harlan, J.). In passing the Access Act, Congress acted to ensure that violence and aggressive obstruction are not used as means of settling what has become a loud and vexing public dispute.

The Access Act strikes a balance among competing rights holders. It protects those who seek or provide reproductive health services without suppressing robust debate about abortion. Those opposed to abortion or to any other reproductive health service retain the freedom to express their deeply-held moral or religious views in a peaceful, non-obstructive way.

The district court's order dismissing the complaint is affirmed.

AFFIRMED

APPENDIX II. DISTRICT COURT OPINIONS

Woodall v. Reno, Civil Action No. 94-774-A

[FILED JULY 15, 1994]

ORDER

For the reasons stated in open court, plaintiffs' Motion for a Preliminary Injunction is DENIED and the defendants' Motion to Dismiss is GRANTED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 15th day of July, 1994.

/s/ Leonie M. Brinkema
Leonie M. Brinkema
U.S. District Judge

Alexandria, Virginia

American Life League v. Reno,
Civil Action No. 94-774-A

[FILED JUNE 16, 1994]

OPINION AND ORDER

I. The Parties Involved in this Lawsuit.

Plaintiffs, who are opposed to abortion on moral, religious and other grounds, brought this action challenging the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE" or "the Act"). Along with their Complaint, plaintiffs filed a Motion for a Preliminary Injunction. Defendants filed a Motion to Dismiss. These motions are now before the Court.[1] All parties agreed at oral argument of these motions that the plaintiffs' Second Amended Complaint creates a ripe controversy for this Court to consider and decide.[2]

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[1]On June 3, 1994, the Court previously granted a Motion to Intervene, pursuant to Fed. R. Civ. Pro. 24(a)(2), filed by the National Abortion Federation, Commonwealth Women's Clinic, Capitol Women's Clinic, Dr. George Tiller, Dr. Susan Wicklund and the National Organization for Women. On June 10, 1994, the Court denied, from the bench, plaintiffs' Motion for Class Certification, which had been filed with their Complaint.

[2]Federal courts are courts of limited jurisdiction. See, eg. Marbury v. Madison, 1 Cranch (5 U.S. 137, 173-80 (1803). It is the responsibility of the complainants to allege facts demonstrating that they are the proper parties to invoke judicial resolution of this dispute and that an actual or threatened application of FACE exists. See, Bender v. Williamsport Area School District, 475 U.S. 534, 549, 106 S. Ct. 1326, 1335, 89 L.Ed. 2d 501 (1986); Renne v. Greary, 111 S. Ct. 2331, 2338 (1991). Plaintiffs' original Complaint did not allege that they intended any actions which would arguably invoke the statute in question. Plaintiffs' First Amended Complaint alleged that they have obstructed in the past and "may

[*2] Plaintiff American Life League, Inc. (ALL) is an organization located in Stafford, Virginia, which conducts various educational and legislative activities "relating to the human rights of persons born or unborn." ALL alleges that it does not advocate or condone violent conduct in pursuit of its goals. However, ALL also alleges that it and its members intend to interfere with abortion providers and to injure them financially, by persuading their customers -- pregnant women -- not to undergo abortion procedures. Similarly, ALL alleges that its members' activities at various abortion facilities necessarily injure or intimidate pregnant women in that ALL seeks to evoke feelings of religious or moral guilt or general emotional distress, for the purpose of dissuading women from aborting their pregnancies.

[*3] Plaintiff Patricia Lohman runs a pregnancy counseling service, located approximately 250 feet from an abortion clinic, which counsels pregnant women about alternatives to abortion. She also shares ALL's intent to obstruct clinical entrances. The other named plaintiffs are individuals who have engaged, and would like

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obstruct" entrances to abortion facilities. At oral argument, after dismissing the Amended Complaint as not ripe, the Court permitted plaintiffs to amend again. Plaintiffs' Second Amended Complaint alleges that while individual plaintiffs are peaceable and nonviolent, "in the aggregate, their action at times has constituted, and in the future will constitute, in the words of FACE, a `physical obstruction' (that is, temporarily rendering impassable ingress to an abortion facility)" and that by so doing, they interfere with, and/or intimidate and/or injure abortion seekers and providers. As 18 U.S.C. §248 applies to whoever, by physical obstruction, interferes with a person because that person is obtaining or providing reproductive health services, the plaintiffs' allegations that they plan to do so, combined with their allegations that they have regularly done so in the past, create a sufficient showing that FACE will be applied to them.

to continue to engage, in demonstrating, praying and sidewalk-counseling in the vicinity of facilities which provide abortions. They all claim to be peaceful and nonviolent" but, like ALL's numerous members, they frequently pursue their activities in concert with other like-minded individuals. They allege that their combined physical presence has caused and will cause physical obstruction of the entrance to facilities providing reproductive health care, and that they intend to interfere, nonviolently, with abortion patients and providers.

Defendant Janet Reno, in her capacity as Attorney General of the United States, is charged with the enforcement of the laws of the United States, including FACE.[3] Intervenor National Abortion Federation (NAF) is a professional organization of physicians, nurses and clinics providing reproductive care, including abortions, for women. Intervenors commonwealth Women's Clinic, Capitol Women's Clinic, Dr. George Tiller and Dr. Susan Wicklund are clinics and physicians that perform abortions and have been [*4] threatened and stalked and whose facilities have been damaged by violent anti-abortion protestors. Intervenor National Organization for Women has among its members thousands of women who may seek abortions or other reproductive health services.

II. The Statute at Issue.

On May 26, 1994, President Clinton signed the Freedom of Access to Clinic Entrances Act into law, stating that he intended it to be vigorously enforced. FACE is a criminal statute which provides for both criminal penalties and civil remedies against:

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[3]On June 6, 1994, in Milwaukee, Wisconsin, Federal prosecutors invoked FACE for the first time, charging six people who were arrested June 4, 1994, after they allegedly used chains and concrete-filled 55 gallon drums to attach themselves to two cars parked so as to block the entrance to a downtown Milwaukee clinic for about ninety minutes.

> "whoever-- (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services-"

18 U.S.C. § 248 (a) (1).[4] The essential, elements of a violation of [*5] 18 U.S. C. § 248 (a) (1) are conduct and specific intent. The Act prohibits three kinds of conduct: (1)1, the use of force; (2) the threat of force; and (3) physical obstruction. The spe-

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[4]The statute provides for the following criminal penalties: for a first offense, a fine or imprisonment for up to one year. Anyone committing a second or subsequent offense shall

> be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; the fine shall be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

Civil remedies include injunctive relief, compensatory and punitive damages, along with costs and reasonable attorney and expert witness fees. In lieu of actual damages, statutory damages of $5,000 per violation are available. 18 U.S.C. § 248(4)(1)(A) and (B). FACE also empowers the Attorney General, of the United States, as well as the state attorneys general to bring civil actions for injunctive relief and civil penalties against individual or group violators. 18 U.S. C. § 248(c)(2) and (3).

cific intent necessary to run afoul of FACE is intent to injure, intimidate or interfere with a person who is obtaining or has obtained or is providing or has provided, reproductive health services. Plaintiffs' nonviolent activities, as described in their second Amended Complaint, fall within the statute's ambit because they allege that they will cause a physical obstruction of clinics that provide abortion services, with the requisite intent to financially injure the abortion providers and to "interfere with" the women who may be entering a facility to procure an abortion.

III. Congress's Authority to Enact FACE.

At the outset, the Court rejects the plaintiffs, argument that Congress lacked authority to enact FACE. Congress has the power, under the Commerce Clause, U.S. Const. art. I §8, cl. 3, and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, to regulate interstate commerce and intrastate activity that affects interstate commerce. United States v. Wrightwood Dairy Co., 315 U.S. 110, 120 (1942); Katzenbach v. McClung, 379 U.S. 294, 301-302 (1964) ; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). This authority extends to enacting criminal penalties for [*6] individual acts, even if not all of the potential defendants had actual connections to interstate commerce. Perez v. United States, 402 U.S. 146, 154-156 (1971); Russell v. United States, 471 U.S. 858 (1985). The legislative history of FACE shows that Congress had evidence both of numerous women crossing state lines to obtain reproductive services no longer available in their home states and of anti-abortion organizations crossing state lines in order to orchestrate violence against abortion providers and patients. S. Rep. No. 117, 103d Cong., lst Sess. The Senate hearings also include extensive testimony concerning the inability and, in some cases, willingness of local law enforcement authorities to provide adequate protection for reproductive health service clinics, their staffs, and patients.[5] Id. We find

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[5]For example, the Senate Report notes in its discussion of the need for such legislation that:

that Congress had ample evidence of the impact upon interstate commerce of myriad threats, bombings, stalkings, blockades and assaults inflicted on reproductive health services providers and patients, and that the prohibitions in FACE are a reasonable and appropriate means to [*7] address the problem. See Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 276i(1.981).

IV. Freedom of Expression Issues.

At the heart of plaintiffs, constitutional challenge are their arguments that FACE prohibits and penalizes, or chills, free expression of religious, moral and philosophical beliefs; that it impermissibly focuses criminal and civil sanctions on particular viewpoints; and that it is unconstitutionally vague, giving lawabiding citizens inadequate guidance as to exactly what it prohibits.

Plaintiffs first argue that FACE is overbroad because they believe it imposes criminal and civil penalties for forms of expression, such as praying and sidewalk counseling, which are covered by the First Amend-

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> From 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder. In addition, over 6,000 clinic blockades and other disruptions have been reported since 1977. The record before the Committee establishes that state and local law enforcement is inadequate to handle this situation, and that Federal legislation is urgently needed.

Id. at 3.

ment. Overbreadth refers to a statute's being written so as to include protected First Amendment activity along with unprotected conduct. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Their argument is largely based on their expressed concern that the term "injure," which is not defined in the Act, might include psychological or emotional injury, which could result from plaintiffs' pure speech. Plaintiffs make the point that pure speech, which is at the core of First Amendment protection, may, and is, in the context of abortion protest, intended to, "injure" by causing emotional pain and to "intimidate" or, if persuasive and articulate, even "interfere." They argue that persons who desire to express their views, pray and sidewalkcounsel at the entrance of reproductive health services facilities [*8] are now afraid to do so for fear that these peaceful, nonviolent, expressive activities are prohibited by FACE. In other words, plaintiffs argue that their First Amendment expression will be "chilled."

Contrary to plaintiffs, assertions, the Court finds that this statute avoids infringing on legitimate First Amendment rights. Nothing in the language of FACE prohibits pure speech; rather the Act criminalizes the use of force, threat of force, and physical obstruction. 18 U.S.C. § 248(a)(1). These acts have long been outside the scope of the First Amendment's protection. Wisconsin v. Mitchell, 113 S.Ct. 2194,'2199 (1993). In Mitchell, a unanimous Court held that a penalty enhancement for criminal conduct motivated by racial bias did not violate the First Amendment. The Court explained that conduct does not become "speech" entitled to the protection of the First Amendment whenever the actor intends to express an idea through his conduct. Id., quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection"). FACE is crafted to prohibit and penalize only those "potentially expressive" acts that Congress found were producing and would continue to produce "special harms distinct from their communicative impact." See Roberts, supra. Even the

non-violent blocking which plaintiffs contemplate constitutes the torts of trespass, battery and false imprisonment under state laws. More [*9] importantly, in the scenario which plaintiffs have chosen to present for the Court's review, non-violent obstruction of clinic entrances prevents women from exercising their constitutional right to an abortion. See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992). The First Amendment protects the plaintiffs' right to hold and express beliefs opposing abortion; it does not give them unfettered license to express those beliefs in conduct. Similarly, threats to use force are not protected by the First Amendment, and Congress may criminalize threats to a particular victim if doing so furthers an important interest. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992).

Plaintiffs' argument that their rights to pray and counsel will be chilled is but a restatement of the previous argument. As discussed above, FACE does not apply, on its face, to purely verbal activity. Plaintiffs rely upon R.A.V. v. City of St. Paul, supra, in which the Supreme Court found a "hate crime" ordinance prohibiting the display of certain symbols, objects, appellations and graffiti facially invalid. This reliance is misplaced. The St. Paul ordinance focussed on particular viewpoints and directly prohibited verbal expression; as discussed infra, FACE does neither.

Because FACE's language refers to action, not words, plaintiffs have exercised their creativity to find interpretations of the Act's terms that encompass pure speech. However, their arguments ignore the definitions of the relevant terms included in [*10] the Act itself, which each describe tortious conduct rather than viewpoint expression. The Act, for example, defines the term "interfere with" to mean "to restrict a person's freedom of movement." 18 U.S.C. § 248 (e)(2). Words or prayers alone will not restrict a person's freedom of movement. Speaking or praying accompanied by shoving or positioning oneself to block a walkway, as plaintiffs intend, will restrict a person's freedom of movement. The former--pure speech--does not

violate the Act; the latter--speech plus conduct--will create a prohibited interference.

In addition to drafting FACE narrowly so as to prohibit certain conduct, rather than speech, Congress included "Rules of Construction" the first of which is: "--Nothing in this section shall be construed-- (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1). While the Court agrees with plaintiffs that Congress could not make a fatally flawed law constitutional merely by including a saving clause, in this context the rule of construction removes any ambiguity which plaintiffs can inject into the otherwise plain meaning of the Act's words. Without ambiguity, there is no chill. Protestors who are not chilled by the existing laws against trespass and assault could not reasonably be chilled by this Act.

The plaintiffs also argue that FACE is unconstitutionally vague on its face. Their argument is essentially the same one addressed above in the overbreadth discussion. A statute is [*11] unconstitutionally vague if people of common intelligence must guess at its meaning. Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). The Court does not agree that the Act is vague. The language of FACE is neither technical nor arcane. Moreover, most of the operative words come from other statutes which the Supreme Court has construed and found not unconstitutionally vague. Of particular relevance is the Supreme Court's decision that a statute which prohibited "picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress" was not unconstitutionally vague. Cameron v. Johnson, 390 U.S. 611, 612 (1968). This is the same definition for "physical obstruction" that appears in FACE. This Court cannot hold that this definition is unconstitutionally vague.

The remaining terms, "use of force" and "threat of force" are, without a doubt, clear to anyone making an honest effort to understand rather than ignore the plain meaning of this Act. FACE plainly prohibits only

physical obstruction, the use of force, and threats. Congress need not append a laundry list of violent acts, threats and manners of obstructing in order to express its clear intent.

The plaintiffs further argue that FACE is not viewpoint neutral because, they assert, it applies only to anti-abortion protestors, "and not to persons who use similar tactics or worse to persuade women to have abortions they do not want." Upon a reading of the unambiguous language of FACE, the Court disagrees with this characterization of the statute. Plaintiffs cannot point [*12] to any language in FACE which supports their interpretation. Instead, they rely on a sentence uttered by Senator Kennedy during floor debate of a proposed amendment which was subsequently defeated. The proposed amendment, according to plaintiffs, would have provided a cause of action for would-be protestors who allege violations of their First Amendment rights through the suppression of anti-abortion demonstrations. Senator Kennedy spoke against the proposed amendment, stating "a cause of action for prolife demonstrators will transform the bill from a clinic access bill to a clinic harassment bill." 139 Cong. Rec. S15706 (daily ed, November 16, 1993) (statement of Senator Kennedy). Plaintiffs argue that despite Senator Kennedy's characterizing FACE as "a clinic access bill", his statement supports their position that FACE applies only to anti-abortion protestors. This needle from a veritable haystack of legislative history is not relevant to our interpretation. Where the plain language of a statute is clear and unambiguous, courts do not look to the legislative history to find some different meaning. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) Consumer Product Safety Comm'n. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980,). While it is clear from the Senate hearings that Congress was concerned about protecting clinics from violent anti-abortion protestors, FACE applies to "whoever" engages in the prohibited conduct, with the requisite intent to injure, intimidate or interfere with "any person" who is entering a facility to obtain reproductive health services. 18 U.S.C. § 248. Both the terms "whoever" and "person" are gender- [*13]

neutral. The Act defines "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(d). This broad definition of reproductive health services encompasses a wide variety of services and procedures including diagnosis and treatment of sexually transmitted diseases, infertility testing and treatments, pre-natal care, obstetrics, and, presumably, controversial conception treatments, such as in vitro fertilization of surrogate mothers and thawing of frozen embryos. Anyone, male or female, entering a facility seeking any of these medical services is protected under FACE. As such, although the statute is subject-specific in that it protects access to reproductive health services facilities, it is nevertheless viewpoint-neutral.

V. Free Exercise Clause

Finally, plaintiffs assert that FACE violates the Free Exercise Clause of the First Amendment to the Constitution, as well as the Restoration of Religious Freedom Act, 42 U.S.C §§2000bb(b) (2), which provides that the government cannot "substantially burden a person's right to exercise of religion" unless it can show that such burden is the least restrictive means of furthering a compelling governmental interest. Plaintiffs' argument is that Congress's passage of FACE was motivated by "animosity to religion." They rely on Church of Lukumi Babalu Ave [*14] v. Hialeah, 113 S. Ct. 2217, 2234 (1993) which struck down a law contrived to prohibit ritual animal sacrifices performed by a particular sect as violating the Establishment Clause. That case is distinguishable from the case at bar in several ways, not the least of which is that animal welfare is not constitutionally protected, whereas a woman's right to an abortion is constitutionally protected. See Roe and Casey, supra. Moreover, from its legislative history, we know that it was the history of violent attacks against abortion clinics, providers and their patients, and other religion-neutral reasons which motivated Con-

gress to enact FACE.

It suffices here to note that the plaintiffs have not alleged in any of their three complaints and do not contend in their memoranda that physical obstruction of abortion clinics is a sacrament or important ritual necessary to their observance of their faith. They have alleged that they oppose abortion on religious and moral grounds, and that they desire to pray for the souls of women who are obtaining abortions and for the souls of their unborn children. Their goal is to prevent abortions. Nothing in the Act impinges upon plaintiffs, ability to pray for these results. What is limited by the Act is what else they may do while praying and counseling. They may not pray and counsel so as to physically obstruct access to reproductive health service facilities. As defined in the Act, "physical obstruction" means "rendering impassable ingress to or egress from a clinic." This language provides adequate guidance for anyone who truly wants to [*15] understand the scope of the Act, rather than look for tortured interpretations of its words. The statute, on its face, neither prohibits nor inhibits such prayers, counseling or self-expression.

VI Conclusion

For the above reasons, the Court holds that FACE is constitutional. The United States' Motion to Dismiss is therefore GRANTED, and plaintiffs' Second Amended Complaint is hereby DISMISSED WITH PREJUDICE. This decision renders moot the plaintiffs' Motion for a Preliminary Injunction.

The Clerk is directed to forward copies of this opinion and Order to counsel of record.

Entered this 16th day of June, 1994.

/s/ Leonie M. Brinkema
Leonie M. Brinkema
U.S. District Judge

Alexandria, Virginia

APPENDIX III. STATUTE

FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994

SECTION 1. SHORT TITLE.

This Act may be cited as the "Freedom of Access to Clinic Entrances Act of 1994."

SEC. 2. PURPOSE.

Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

SEC. 3. FREEDOM OF ACCESS TO CLINIC ENTRANCES.

Chapter 13 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"Sec. 248 Freedom of Access to Clinic Entrances.

(a) Prohibited Activities.--Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services,

(2) by force or threat of force or by physical

obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate from, lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.--Whoever violates this section shall--

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense, and the fine shall be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil Remedies.--

(1) Right of action.--

(A) In general.--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgement, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5000 per violation.

(2) Action by Attorney General of the United States.--

(A) In general.--If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief.--In any action under subpara-

graph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent--

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations, and

(ii) in an amount not exceeding $15,000 for a nonviolent obstruction and $25,000 for any other subsequent violation

(3) Actions by state attorneys general.--

(A) In general.--If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of Construction.--Nothing is this section shall be construed--

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interferences;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.--As used in this section:

(1) Facility.--The term `facility' includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with.--The term `interfere with' means to restrict a person's freedom of movement.

(3) Intimidate.--The term `intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction.--The term `physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services.--The term `reproductive health services' means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes

medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State.--The term `State' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States."

SEC. 4. CLERICAL AMENDMENT.

The table of sections at the beginning of chapter 13 of title 18, United States Code, is amended by adding at the end the following new item:

"248. Blocking access to reproductive health services."

SEC.5. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any other person or circumstance shall not be affected thereby.

SEC. 6. EFFECTIVE DATE.

This Act takes effect on the date of the enactment of this Act, and shall apply only with respect to conduct occurring on or after such date.